MALAYAN NURSES UNION

v.

SYARIKAT PERNIAGAAN CUEPACS BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
SULONG MATJERAIE JCA
KANG HWEE GEE JCA
CLEMENT SKINNER JCA
[CIVIL APPEAL NO: W-02-1050-2004]
28 JUNE 2010

CIVIL PROCEDURE: *Execution - Judgment and order - Specific performance - Whether order for specific performance a form of writ of execution - Application for leave to enforce judgment and issue execution 11 years after obtaining judgment and order - Whether judgment had lapsed - Whether application incompetent - Whether to be dismissed - Rules of High Court 1980, O. 46 rr. 1, 2*

LAND LAW: *Charge - Unregistered charge - Purchase of property under charge - Vendor wound-up and went into liquidation - Rights and protection of chargee vis-à-vis purchaser of property - Whether charge rendered void - Whether chargee bank enjoyed indefeasibility of title - Whether entitled to be paid monies secured under charge - Whether charge one of equitable charge - Duties of liquidator under circumstances thereof - National Land Code, s. 340 - Companies Act 1965, s. 108(1), (2)*

COMPANY LAW: *Liquidation - Liquidator, duties of - Sale of charged property - Vendor went into liquidation and did not deliver vacant possession to purchaser - Charge not registered by chargee bank - Whether charge rendered void - Order of court against vendor for specific performance of sale - Whether liquidator duty bound to repay chargee bank in order to redeem property - Whether liquidator may avoid Order - Whether reasons for avoidance of Order reasonable - Companies Act 1965, s. 108(1), (2)*

WORDS & PHRASES: *"writ of execution" - Order 46 r. 1 Rules of High Court 1980 - Whether to include order for specific performance*

WORDS & PHRASES: *"any contract or application for repayment of money secured by a charge" - Section 108 Companies Act 1965 - Whether conferring chargee right to be paid immediately money secured under a charge*

In 1983, the appellant had purchased a piece of charged property from the first respondent ('Cuepacs'). Cuepacs had subsequently been wound-up and put under liquidation, and so failed to deliver vacant possession of the property. Arising there from, the appellant applied for and obtained, in 1992, a judgment for specific performance of the relevant sale and purchase agreement, and subsequently an order ordering Cuepacs to "forthwith have the property freed from all encumbrances and execute a Memorandum of Transfer of the said property" ('the Order'). Cuepacs, or the liquidator, did not comply with the Order, and in or about 2003, *ie*, some 11 years later, the appellant applied for leave to enforce the Order. The facts showed however that, simultaneous with the appellant's application, the chargee bank (*ie*, the second respondent) had also applied for leave to commence foreclosure proceeding against the charged property. The learned judge, having heard the two applications, allowed the bank's application but disallowed the appellant's application. The appellant appealed and before the learned justices of appeal questions primarily arose as to (i) whether the appellant's application before the learned judge, considering the time lapse of 11 years herein, and O. 46 r. 2 Rules of the High Court 1980 ('RHC'), was incompetent; and (ii) whether upon the words of s. 108(1) of the Companies Act 1965 ('the Act'), the charge, not apparently being a registered charge, was void and unenforceable in law.

Held (dismissing appeal)
Per Kang Hwee Ghee JCA delivering the judgment of the court:

(1) The learned High Court judge was right to have refused the appellant leave to enforce the judgment that it obtained, and to have granted the bank leave to commence foreclosure proceeding. *Ex facie* the bank is still the registered chargee. (para 24)

(2) Although the phrase "writ of execution" in s. 46(1) RHC is broadly defined to include a writ of seizure and sale, a writ of possession and a writ of delivery, it should in our view also include an order for specific performance. (para 7)

(3) The appellant had sought to enforce the Order some 11 years later without obtaining leave as required under O. 46 r. 2(1)(a) of the RHC. Without first obtaining the leave of the

civil court to enforce the judgment which had lapsed under O. 46 r. 2 RHC, the application before the learned judge was therefore incompetent. On this ground alone, the appellant's appeal should be dismissed. (paras 6-8)

(4) The property had been charged to the bank some 10 years before the appellant completed the purchase and on that score, under s. 340 National Land Code, the bank enjoys indefeasibility of title. The bank too was not a party to the Order, and no order was specifically made to compel it to discharge the charge of the property. (paras 12 & 13)

(5) Section 108 may have rendered the unregistered charge void as against the bank, as submitted by the appellant. Nonetheless, that section has also preserved "any contract or application for repayment of money secured by a charge" and conferred upon a chargee the right to be paid immediately by the charger of the money secured under the charge, and therefore, the fact that the charge may have been rendered void under s. 108(1) against the bank would not absolve the liquidator from having to pay "the money secured thereby" to the bank in due compliance of s. 108(2) of the Act. In the circumstances, we would accept the reason proffered by the liquidator that it was unable to comply with the order of specific performance to redeem the property, for, to do that, it would have to settle the sum owed on the charge to the bank, despite the provision of s. 108(1) of the Act. And we would go so far as to express that, notwithstanding the operation of s. 108(1) of the Act which renders the charge under the National land Code void, the bank would still be protected by an equitable charge of the property. (paras 18-21)

Obiter:

(1) The position would have been different had the property been free from any legal charge when the appellant purchased it, in which case Cuepacs would be relegated to a bare trustee of the appellant. The liquidator would under the circumstances be bound to effect a transfer of the property to the appellant notwithstanding that Cuepacs had been wound-up. (para 23)

Bahasa Malaysia *Translation Of Headnotes*

Pada tahun 1983, perayu di sini telah membeli sebidang hartanah yang masih dalam gadaian daripada responden pertama ('Cuepacs'). Cuepacs kemudian telah digulung dan diletak di bawah likuidasi, dan oleh itu gagal menyerahkan milikan kosong hartanah. Berikutnya, perayu memohon dan memperolehi, pada tahun 1992, suatu penghakiman untuk pelaksanaan spesifik, dan seterusnya suatu perintah memerintahkan Cuepacs untuk "dengan serta merta membebaskan hartanah dari apa-apa sekatan dan melaksanakan Memorandum Pindahmilik hartanah tersebut" ('Perintah'). Cuepacs, atau pelikuidator, tidak mematuhi Perintah, dan pada tahun 2003, iaitu lebih kurang 11 tahun kemudian, perayu memohon kebenaran untuk melaksanakan Perintah. Fakta bagaimanapun menunjukkan bahawa, bersekali dengan permohonan perayu, bank pemegang gadaian (yakni responden kedua) telah juga memohon kebenaran untuk melaksanakan prosiding halangtebus terhadap hartanah. Yang arif hakim, setelah mendengar kedua-dua permohonan, telah membenarkan permohonan bank tetapi menolak permohonan perayu. Perayu merayu dan di hadapan hakim-hakim rayuan persoalan-persoalan penting berikut telah berbangkit, iaitu: (i) sama ada permohonan perayu di hadapan yang arif hakim, mengambilkira keluputan masa dan A. 46 k. 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), tidak berkompeten; dan (ii) sama ada berdasarkan peruntukan s. 108(1) Akta Syarikat 1965, gadaian, yang kelihatannya tidak didaftar, adalah terbatal dan tidak boleh dikuatkuasakan di sisi undang-undang.

Diputuskan (menolak rayuan)
Oleh Kang Hwee Gee HMR menyampaikan penghakiman mahkamah:

(1) Yang arif hakim Mahkamah Tinggi betul dalam menolak kebenaran kepada perayu bagi menguatkuasakan penghakiman yang diperolehinya, dan dalam memberi kebenaran kepada bank untuk menghalangtebus. Bank, *ex facie*, masih merupakan pemegang gadaian berdaftar.

(2) Walaupun ungkapan "writ pelaksanaan" di dalam A. 46(1) KMT telah ditakrif secara meluas sebagai merangkumi writ rampasan dan jualan, writ pemilikan dan writ penyerahan, namun ia juga pada pendapat kami harus meliputi suatu perintah bagi pelaksanaan spesifik.

(3) Perayu telah cuba menguatkuasakan Perintah lebih kurang 11 tahun kemudiannya tanpa memperoleh kebenaran seperti yang dikehendaki oleh A. 46(2)(1)(a) KMT. Tanpa terlebih dahulu mendapat kebenaran mahkamah sivil untuk melaksanakan penghakiman yang telah luput di bawah A. 46 k. 2 KMT, permohonan di hadapan yang arif hakim adalah dengan itu tidak berkompeten. Atas alasan ini sahaja rayuan perayu sudah boleh ditolak.

(4) Hartanah telah digadaikan ke bank kira-kira 10 tahun sebelum perayu menyempurnakan pembelian dan atas alasan itu, di bawah s. 340 Kanun Tanah Negara, bank memperoleh ketaksangkalan hakmilik. Bank juga bukan pihak kepada Perintah, dan tiada apa-apa perintah telah dibuat bagi memaksanya melepaskan gadaian hartanah.

(5) Seksyen 108 mungkin boleh menyebabkan gadaian yang tidak berdaftar tak sah setakat yang mengaitkan bank, seperti yang dihujahkan perayu. Namun, seksyen yang sama juga telah mempertahankan "mana-mana kontrak atau permohonan pembayaran balik wang yang dijamin oleh gadaian" dan telah memberikan hak kepada pemegang gadaian untuk dibayar dengan serta merta oleh penggadai wang yang dijamin dibawah gadaian, yang berakibat, walaupun gadaian mungkin menjadi batal terhadap bank di bawah s. 108(1), pelikuidator, dalam mematuhi s. 108(2) Akta, masih bertanggungan untuk membayar "wang yang dijamin berkenaan" kepada bank. Dalam halkedaan sedemikian, kami menerima alasan yang dikemukakan oleh pelikuidator bahawa ia tidak dapat mematuhi perintah pelaksanaan spesifik untuk menebus hartanah kerana, untuk berbuat demikian, ia terpaksa melangsaikan jumlah yang terhutang kepada bank di bawah gadaian, walaupun dengan adanya peruntukan s. 108(1) Akta. Dan kami malah boleh mengatakan seterusnya bahawa, walaupun dengan operasi s. 108(1) Akta yang menjadikan gadaian batal di bawah Kanun Tanah Negara, bank masih lagi dilindungi oleh suatu gadaian berekuiti hartanah tersebut.

Obiter:

(1) Kedudukannya adalah berbeza jika hartanah bebas dari sebarang gadaian undang-undang apabila perayu membelinya, dalam keadaan mana Cuepacs akan hanya menjadi semata-

A mata pemegang amanah perayu. Dalam keadaan tersebut pelikuidator akan bertanggungan untuk melaksanakan pindahmilik hartanah kepada perayu walaupun Cuepacs telah digulung.

B **Case(s) referred to:**
Murphy & Anor v. Wright [1992] 5 BPR 11 ***(refd)***

Legislation referred to:
Banking and Financial Institutions Act 1989, s. 50
Companies Act 1965, ss. 108(1), (2), 226(3)
C National Land Code, s. 340
Rules of the High Court 1980, O. 46 rr. 1, 2(1)(a)

For the plaintiff - Rajinder Singh; M/s Puthucheary
For the 1st respondent - Chin Tzi Song; M/s Ariffin & Partners
For the 2nd respondent - Andrew Chiew; M/s Lee Hishammuddin Allen &
D *Gledhill*

[Appeal from High Court, Kuala Lumpur; Companies Winding Up No: D3-28-283-1993]

Reported by Wan Sharif Wan Ahmad
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JUDGMENT

Kang Hwee Gee JCA:
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[1] This is an appeal by the appellant, Malayan Nurses Union ("the appellant") against the refusal of the High Court to grant the appellant leave to enforce a judgment which it had obtained against Syarikat Perniagaan Cuepacs Berhad (in liquidation),
G pursuant to s. 226(3) of the Companies Act 1965.

[2] Syarikat Perniagaan Cuepacs Berhad ("Cuepacs") had been wound up by the court on 24 August 1994. Subsequently a provisional liquidator Messrs. Deloitte Kassim Chan ("the
H liquidator") was appointed to liquidate its assets.

[3] The leave sought for by the appellant arose from the purchase by the appellant of a property known as No. 15 Jalan Pakis Satu, Cheras, Kuala Lumpur, from Cuepacs, the full purchase price of which was fully settled on 3 October 1983
I before Cuepacs was wound up.

[4] The said property was at the time of the sale to the appellant encumbered, having been charged to Bank Buruh (Malaysia) Berhad on 28 May 1981. The property now vests on the 2nd respondent Affin Bank Berhad ("the bank") *vide* a vesting order dated 18 December 2000 pursuant to s. 50 of the Banking and Financial Institutions Act 1989.

[5] The appellant's application for leave was heard together at the High Court with an earlier application (encl. 54) of the Bank for leave under the same s. 226(3) of the Companies Act 1965 to commence foreclosure proceeding on the charged property. The bank's application was allowed by the learned judge.

[6] We read the order dated 2 September 1992 that the appellant obtained from the court in civil action No. S4-22-415-92. We note that the appellant only sought to enforce the order some eleven years later without obtaining leave as required under O. 46 r. 2(1)(a) of the Rules of the High Court 1980 which read:

> A writ of execution to enforce a judgment or order may not issue without the leave of the Court in the following cases, that is to say:
>
> (a) where six years or more have lapsed since the date of the judgment or order;

[7] Under O. 46 r. 1 a "writ of execution" is broadly defined to include a writ of seizure and sale, a writ of possession and a writ of delivery, and in our view, should include an order of specific performance.

[8] Without first obtaining the leave of the civil court to enforce the judgment which had lapsed under O. 46 r. 2 the application before the learned judge was therefore incompetent.

[9] We accept the submission of counsel for the bank that on this ground alone the appellant's appeal should be dismissed.

[10] Nevertheless for completeness we also went on to examine the merit of the appellant's application for leave to enforce the judgment.

[11] First, we examined the order obtained by the appellant which read:

A (a) an Order for specific performance of the Sale & Purchase Agreement dated 27th October, 1981 by the Defendant to forthwith have the property freed from all encumbrances and execute a Memorandum of Transfer of the said property held under Geran 31216, Lot 7175, Mukim Cheras, Daerah Ulu Langat and cause the same to be registered in favour of the
B Plaintiff, failing which the Senior Assistant Registrar of the High Court be empowered to execute all necessary documents;

(b) the recovery of the sum of $5,281.51;

C (c) interest on the sum $5,281.51 at the rate of 8% per annum from the 16th day of September, 1983 to date of full settlement;

(d) costs.

D **[12]** We note that the order sought for relates to a property which had originally been charged to Bank Buruh (Malaysia) Berhad, (the predecessor of the present Bank), some ten years before the appellant completed its purchase. Under s. 340 of the National Land Code the Bank enjoys indefeasibility of interest.
E

[13] The record shows that the appellant was aware of the subsisting legal charge held by the Bank before the appellant commenced civil action No. S4-22-415-92. The judgment obtained by the appellant only ordered Cuepacs to "forthwith have the
F property freed from all encumbrances". The bank was not a party and no order was specifically made to compel it to discharge the charge of the property.

[14] It is clear that to enforce the order of the court "to
G forthwith have the property freed from all encumbrances and execute a Memorandum of Transfer of the said property", the liquidator would have to discharge the charge by paying off the sum owed under the charge to the bank, a function which the liquidator cannot perform in view of the insolvency of Cuepacs.

H **[15]** Next, we examined s. 108(1) of the Companies Act 1965 which renders an unregistered charge void as against the liquidator and any creditors of the company. It reads:

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> Subject to this Division where a charge to which this section applies is created by a company, there shall be lodged with the Registrar for registration within thirty days after the creation of the charge a statement of the prescribed particulars, and if this section is not complied with in relation to the charge, the charge shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company.

[16] But s. 108(2) reads:

> Nothing in subsection (1) shall prejudice any contract or application for repayment of the money secured by a charge and when a charge becomes void under this section the money secured thereby shall immediately become payable.

[17] There is a dispute as to whether the 2nd respondent had registered the charge with the Registrar of Companies (now the Companies Commission). We examined the record and were unable to find that the subject property, known as No. 15 Jalan Pakis Satu, Cheras, Kuala Lumpur, had been registered.

[18] We accept the submission of counsel for the appellant that s. 108(1) may have rendered the unregistered charge void as against the Bank, but in the same breath s. 108(2) preserves "any contract or application for repayment of money secured by a charge" and conferred upon the chargee the right to be paid immediately by the chargor of the money secured under the charge.

[19] The fact that the charge may have been rendered void under s. 108(1) against the bank would not therefore absolve the liquidator from having to pay "the money secured thereby" to the bank in due compliance of s. 108(2) of the Act.

[20] We therefore accept the reason proffered by the liquidator that it would not be able to comply with the order of specific performance to redeem the property – for to do so it would still have to settle the sum owed on the charge to the bank, despite the provision of s. 108(1) of the Act.

[21] We would go so far as to express our view that notwithstanding the operation of s. 108(1) of the Act which renders the charge under the National Land Code void, the bank would still be protected by an equitable charge on the property.

[22] We are persuaded by the majority decision of the Court of Appeal of the Supreme Court of New South Wales in *Murphy & Anor v. Wright* [1992] 5 BPR 11, 734 (Priestley, Handley, and Sheller JJA; Sheller JA dissenting) that an exercise of an option in an agreement to enter a caveat on a land upon a default on the repayment of a loan creates an equitable charge on a "Torren's title" land – a *fortiori*, in the instant case where a statute (s. 108(2) of the Companies Act 1965) preserves the "contract or any repayment of money secured under a charge" and confers a right on the chargee the right to be paid immediately.

[23] The position would be entirely different had the property been free from any legal charge when the appellant purchased it, in which case Cuepacs would be relegated to a bare trustee of the appellant of the property after the full purchase price was paid. The liquidator would under the circumstances, be bound to effect a transfer of the property to the appellant notwithstanding that Cuepacs had been wound up.

[24] The learned High Court Judge was right to have refused the appellant leave to enforce the judgment that it obtained. He was also right in granting the bank leave to commence foreclosure proceeding – for *ex facie* the bank is still the registered chargee.

[25] The question of whether an order of sale should be granted by reason of the bank's seeming incapacity under s. 108(1) of the Companies Act 1965 should be heard at a full hearing on the merit and not at this leave stage.

[26] For the foregoing reasons we dismiss the appeal with costs.

[27] Both Justice Sulong Matjeraie and Justice Clement Allan Skinner have read the draft of this judgment and have agreed with the views expressed therein.